No. 18880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GILBERT HERNANDEZ RODRIGUEZ and BEATRICE MARTINEZ DELGADO,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On February 13, 1963, the Federal Grand Jury for the Southern District of California returned an indictment in seven counts charging the appellants, Gilbert Hernandez Rodriguez and Beatrice Martinez Delgado, in the last three counts with violations of the narcotics laws of the United States as proscribed in Title 21, United States Code, Sections 174 and 176(a). [C. T. 2-10.][1] The appellants and their co-defendants were arraigned in the court of the Honorable Thurmond Clarke on February 25, 1963, and all entered pleas of not guilty on March 11, 1963. The case was then transferred to the calendar of the Honorable Jesse W. Curtis, Jr. After the matter was referred to Judge

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[1]C. T. refers to the Clerk's Transcript of Record.

Curtis the other defendants entered pleas of guilty and the further proceedings, excepting sentencing, related to the appellants only.

The filing of a timely Motion to Suppress resulted in a hearing on the motion on April 19, 1963. Based upon the evidence adduced at the hearing, the court denied the motion of the appellants. [C. T. 12.] On April 24, 1963, a jury was empanelled and further proceedings were continued to the following day. [C. T. 13.] The trial of the matter was heard on April 25th and 26th of 1963. [C. T. 14-16]. On the latter date the jury returned a guilty verdict as to both appellants with respect to counts eight and nine; Rodriguez and Delgado were acquitted of the charges contained in count seven. [C. T. 17, 18.]

On May 27, 1963, the date set for sentencing, counsel for the appellants argued a Motion for Judgment of Acquittal Notwithstanding the Verdict and, in the alternative, for a New Trial. The motions were denied by the trial court and the appellants were then both sentenced to the custody of the Attorney General for a period of five years on counts eight and nine, with the further order that the sentences were to run concurrently. [C. T. 17-21.] On the same date a timely Notice of Appeal was filed on behalf of both appellants. [C. T. 22, 23.]

The jurisdiction of the United States District Court is premised on Section 3231 of Title 18, United States Code. The Court of Appeals may entertain this matter under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II.
STATEMENT OF THE CASE.

A. Questions Presented.

The first question presented by the appellants' brief is whether the evidence was properly seized. Secondly, there is presented the question of whether there were sufficient facts adduced at trial to sustain the verdicts.

B. Statement of the Facts.

In viewing the facts of this case, the context within which the law enforcement officers were acting must be kept constantly in mind. These facts indicate that on January 14, 1963, surveilling officers observed a government informant, Daniel Estrada, meet with James Angulo and Manuel Martinez at 910 South Boyle Street in Los Angeles, California. Via a Fargo receiver, the officers overheard the parties engage in a conversation relative to a sale of narcotics. Later in the day, at another location, the law officers saw Manuel Martinez hand James Angulo a small packet of heroin. [R. T. 67, 68.][2] This transaction occasioned count five of the indictment. [C. T. 6.]

Having knowledge that Manuel Martinez was trafficking in narcotics, the officers sought to maintain a surveillance of Martinez in order that further information could be developed as to his pattern of movement, his associates and the location of his cache. [R. T. 40, 53.] From the 14th of January to the date here in question, February 6, 1963, the officers sought to ascertain the whereabouts of Martinez—at no time did they observe him or have any knowledge as to his whereabouts. [R. T. 10, 38, 40 and 50.] In seeking to

[2]R. T. refers to the Reporter's Transcript of Record.

develop information relative to the location of Manuel Martinez, the officers placed 910 South Boyle Street under sporadic surveillance. [R. T. 8, 23.] This persistence was rewarded on the night of February 6, 1963. [R. T. 5.]

On that evening the investigating officers, Deputies Velasquez and Stoops and Sergeant Cook of the Narcotics Detail, Los Angeles Sheriff's Office, and Agent Watson of the Federal Bureau of Narcotics were pursuing their search for Martinez. Watson and Cook were in one vehicle and drove throughout an area in East Los Angeles in which they felt that Martinez might be found. [R. T. 37.] Their search on that evening included what they believed to be Martinez' residence on Ganahl Street. [R. T. 26, 37.] In the meantime Deputies Velasquez and Stoops had droven their vehicle to a position from which they could observe the area of 910 South Boyle Street. [R. T. 51, 56.] From their vantage point they saw an Union Oil Company gasoline station. Abutting the station property was a fence and on the other side of the fence was a drive which led to the 910 address, the lower floor of a two-story apartment unit, located at the rear of a Spanish restaurant known as "Cooki's." [R. T. 103.] While parked, the officers observed Manuel Martinez drive into the Union Station in a 1962 Monza coupe and park on the parking lot portion of the station; this occurred at approximately 6:15 p.m. They then saw Manuel Martinez and a female, later identified as his wife, leave the car and proceed across the lot to Boyle Street, then down the walkway, adjacent to "Cooki's," leading to the 910 address. [R. T. 104.] Fifteen minutes later, Watson and Cook, having completed a fruit-

less search, joined the surveilling officers who were maintaining an observation of Martinez' car. [R. T. 42.] At that time the officers determined that they should place Manuel Martinez under arrest since he had proved to be such an illusive quarry. [R. T. 40.]

The four officers then walked down the drive to the apartment to the rear of the restaurant. Velasquez knocked on the door and called for "Manuel." A few moments passed and the appellant Rodriguez opened the door. When the door was opened Velasquez presented his Sheriff's identification card, informed Rodriguez that he was a Deputy Sheriff, and requested permission to enter the residence. Rodriguez opened the door and stepped aside; as he did, Velasquez entered the living room and observed Manuel Martinez, his wife and the appellant Delgado to his immediate left at the door to a bedroom. [R. T. 106-108.] Velasquez placed Martinez under arrest and advised him that he was under arrest for violating the federal narcotics laws; Martinez was further informed of his constitutional rights. [R. T. 58, 106.] The other officers made their entry on the heels of Velasquez. Velasquez then inquired of Rodriquez as to who resided in the apartment and Rodriguez replied that his common law wife, the appellant Delgado who is the sister of Manuel Martinez, and their two children lived at the 910 address. [R. T. 112.] Velasquez then informed Rodriguez that the officers had reason to believe that narcotics might be secreted in the house and requested Rodriguez' permission to conduct a search. To this inquiry the appellant Rodriguez stated that "he had nothing to hide: that he had been out of the penitentiary for two years; that he was currently on parole; that

he had kept clean and we could go ahead and search." [R. T. 59, lines 14-17.]

The agents then conducted a search of the apartment. The bedroom to the right, as one faces the living room from the front door, appeared to be a child's room in that there was a single bed, a toy box and a television set. Velasquez conducted a search of this room and stated that he observed a green plastic clothes basket on top of the bed. An examination of the contents of the basket revealed a quantity of laundred clothes. Amongst these clothes, approximately half way down, Deputy Velasquez discovered a rubber contraceptive containing a white powdery substance. The agents conducted a field test of the contents of the contraceptive and determined that the substance contained therein was heroin. [R. T. 114, 117.] Delgado and Rodriguez were then placed under arrest and Velasquez commenced a search of the left bedroom, the one in which Manuel Martinez, his wife and the appellant Delgado were observed by Deputy Velasquez when he entered the apartment. This room appeared to be the master bedroom in that it contained a double bed and closets and dressers with various adult articles of clothing. Further, at the foot of the bed there was a portable television set and a night table. [R. T. 118.] A search revealed $150 in cash in a purse in a closet and currency in the amount of $500 in another purse in the dresser. The drawer to the night stand was opened by Velasquez and within it he discovered seven brown paper-wrapped cigarettes containing a green leafy substance, later ascertained to be marihuana. There was also discovered within the drawer a folded newspaper containing a loose quantity of marihuana. [R. T. 124.]

When the appellants were indicted, they were charged relative to the heroin in count seven and with respect to the marihuana in counts eight and nine. [C. T. 8-10.] At trial they were acquitted of the heroin count and convicted on the marihuana counts. [C. T. 17, 18.]

III.

ARGUMENT.

A. The Motion to Suppress Was Properly Denied.

The record clearly reveals that the peace officers had neither a search nor arrest warrant when they recovered the contraband which resulted in the convictions of the appellants. However, it is the contention of the government that neither type of warrant was required by the officers.

The search may first be validated as incidental to a lawful arrest. As stated by our Supreme Court in *Agnello v. United States* (1925), 269 U. S. 20, 30, 46 S. Ct. 4, 70 L. Ed. 145;

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime and its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted . . ." (Citations omitted.)

This rule of law has more recently been voiced in *United States v. Rabinowitz* (1950), 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653; *Harris v. United States* (1946), 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed.

1399; *Burks v. United States* (9th Cir. 1961), 287 F. 2d 117 and *Leahy v. United States* (9th Cir. 1959), 272 F. 2d 487, cert. granted 363 U. S. 810, 80 S. Ct. 1246, 4 L. Ed. 2d 1152; cert. dismissed 364 U. S. 945 81 S. Ct. 465, 5 L Ed. 2d 459.

The question then arises as to whether there was a lawful arrest. The fact that Manuel Martinez had violated the federal narcotic laws on January 14, 1963, is not contested by the appellants and, if it were, the record does indicate that Deputy Sheriff Valesquez had overheard and seen Manuel Martinez engage in a sale of heroin on that day in January. [R. T. 67, 68.] Based upon this and the fact that Federal Bureau of Narcotics Agent Harry Watson took part in the investigation and arrest of Martinez, the United States asserts that the arrest was legal as provided in Title 26, United States Code, Section 7607, which states in part:

> ". . . Agents of the Bureau of Narcotics . . . may
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . or marihuana . . . where such person has reasonable grounds to believe that the person to be arrested has committed . . . such violation."

The legality of an arrest without a warrant under the aforementioned statute has been considered by this Circuit and approved in the recent cases of *Teasley v. United States* (9th Cir. 1961), 292 F. 2d 460 and *Polk v. United States* (9th Cir. 1961), 291 F. 2d 230. See also *Fernandez v. United States* (9th Cir. 1963), 321 F. 2d 283 and *Busby v. United States* (9th Cir. 1961), 296 F. 2d 328, cert. den. 369 U. S. 843, 82 S. Ct. 874, 7 L. Ed. 2d 847.

Completely independent of the above basis of admissibility is the consent of the appellant Rodriguez. This Court has discussed consent as validating a warrantless search and has said:

> ". . . It is still true that a search to which voluntary consent is given is not an unlawful search and evidence thereby obtained is admissible . . ." *Frye v. United States* (9th Cir. 1963), 315 F. 2d 491, 494.

For other pronouncements upon this subject see *United States v. Page* (9th Cir. 1962), 302 F. 2d 81 and *Poetter v. United States* (9th Cir. 1929), 31 F. 2d 438.

Before meeting the appellants' arguments that the arrest of Manuel Martinez was merely a ruse to conduct an exploratory search of the residence and that there was a lack of consent; it is well to keep in mind the admonition of the United States Supreme Court which said in *Harris, supra,* at page 155:

> "The dangers to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusory. This court has always been alert to protect against such abuse. *But we should not permit our knowledge that abuses sometimes occur to give similar coloration to procedures which are basically reasonable . . .*". (Emphasis added.)

Considering the facts indicating that the arrest was not incident to the search, it is apparent that following the narcotics violation by Manuel Martinez on January 14, 1963, the narcotics officers made a bona fide attempt to locate Martinez again as they wished to in-

crease their knowledge of his activities. Naturally, one of the places that they surveilled was the apartment at 910 South Boyle Street, as this was the place that Martinez was first contacted on January 14, the date upon which he sold the heroin. On the evening of February 6, 1963, when Martinez was observed to park his car and walk up the drive towards the appellants' apartment, the officers still were intent on surveillance but when they were joined by their fellow officers and consulted with them it was determined that since Martinez had proven so elusive, it would be better to place him under arrest rather than risk losing him again.

In determining whether the appellant Rodriguez authorized the search, it is helpful to turn to the recent Ninth Circuit decision in *Page v. United States, supra.* The Court faced with a similar consent question, and a perhaps more extreme fact situation, stated at pages 82, 83:

> "The question presented is, does the evidence, viewed most favorably to the government, require a decision, as a matter of law, that the search was illegal and therefore a violation of Page's rights under the Fourth Amendment to the United States Constitution? . . . The question is one of fact, for the trial court to resolve."

In considering this question of fact Judge Duniway, writing for the Court, went on to say at page 84:

> "It is still true, however, that it is the trial judge who hears the witnesses and who must pass upon their credibility. We sometimes tend to forget that the testimony of a witness, presented to us in a cold record, may make an impression upon us directly contrary to that which we would have received had

> we seen and heard the witnesses. It ought not to be assumed that United States District Judges are any less determined to preserve constitutional rights than we are . . ."

With these guide lines in mind we turn to the facts indicating consent. Deputy Velasquez testified that when he knocked on the door at 910 South Boyle Street, he whistled and called out for "Manuel" and in response to this the door was opened by the appellant Rodriguez. Valesquez, dressed in civilian clothes, then identified himself by displaying a deputy sheriff's identification card. At the same time Velasquez said that he was from the Sheriff's Office and asked "[M]ay we come in?" [R. T. 58, line 11.] Rodriguez then stepped back and opened the door. Martinez was immediately placed under arrest and, in the presence of the appellants, advised of his constitutional right to remain silent and further told that anything he said might be used against him in a court of law. Velasquez then turned to Rodriguez, inquired who resided in the apartment and, having been informed by Rodriguez that he and his family occupied the apartment, Velasquez reiterated that Martinez was under arrest for violating federal narcotics laws and stated that the officers had reason to believe that narcotics might be cached in the house [R. T. 58, 59.] Velasquez asksd Rodriguez if they could search the house and Velasquez testified thusly:

> ". . . He stated to me that he had nothing to hide; that he had been out of the penitentiary for two years; that he was currently on parole; that he had kept clean, and we could go ahead and search." [R. T. 59, lines 14-17.]

Both officers Watson and Velasquez stated that at no time did they or their fellow officers draw their weapons and the only time that their side arms could have been exposed was when they removed their jackets during the course of their search. [R. T. 7, 8, 45, 60.] It is interesting that Rodriguez contradicted this only in part. He stated that the officers did not exhibit their pistols upon entering the room; he further testified that the only time the weapon was drawn was when he was placed under arrest, which was some time after he gave his consent. [R. T. 71, 75, 81.] Further, the testimony of Velasquez was that at no time did he or any of his group threaten or intimidate Rodriguez. [R. T. 62.]

In light of the above, it is the government's position that a willing, uncoerced consent was shown at the hearing on the Motion to Suppress. As stated before these facts are closely analogous to the *Page* case and certainly not as extreme as those existent in *McDonald v. United States* (10th Cir. 1962), 307 F. 2d 272 and *United States v. Sferas* (7th Cir. 1954), 210 F. 2d 69, cert. denied 347 U. S. 935, 74 S. Ct. 630, 98 L. Ed. 1068, where consent was found by the trial and reviewing courts.

That such a consent was binding upon the appellant Delgado, who was present when it was given and said nothing, is determined by the *Sferas* case, *supra,* and in this Circuit by *Stein v. United States* (9th Cir. 1948), 166 F. 2d 851, cert. denied 334 U. S. 844, 68 S. Ct. 1512, 92 L. Ed. 1768.

Lest there be any doubt that the trial court employed the same reasoning as above, the United States would turn to the reporter's transcript at pages 84 and 85

where the court stated that there was sufficient cause for the arrest and therefore a legal arrest and then added that he also found that there had been a voluntary consent to the search.

B. There Was Sufficient Evidence to Sustain the Verdict.

The appellants urge that there was insufficient evidence to sustain the jury's verdict in that possession was not proven. The argument progresses that if possession is not proven then the government's case must fall as it is only through the proof of possession that the plaintiff may gain the benefit of the presumption that the contraband was imported into the United States contrary to law; a requisite jurisdictional element.

Mindful that in appraising the sufficiency of the evidence this Court has stated the test to be:

> "[T]he evidence viewed most favorably to the government with all credibility conflicts resolved in the government's favor . . ."
>
> *Blossom Wolf Palmer and Samuel Palmer v. United States* (9th Cir. May 29, 1963), No. 18,225.

And mindful that:

> ". . . so long as the evidence establishes the requisite power in the defendant to control the narcotic drugs, it is immaterial that they may not be within the defendant's immediate physical custody, or, indeed, that they may be physically in the hands of third persons—'possession' as used in this statute includes both actual and constructive possession. The power to control an object may be shared with others, and hence 'possession' . . .

need not be exclusive, but may be joint. Moreover, like other facts relevant to guilt, 'possession', actual or constructive, may be proven by circumstantial evidence."

Hernandez v. United States (9th Cir. 1962), 300 F. 2d 114, 117.

We turn toward analysis of the appellants' objection. The Ninth Circuit decision of *Evans v. United States* (9th Cir. 1958), 257 F. 2d 121, cert. denied 358 U. S. 866, 79 S. Ct. 98, 3 L. Ed. 2d 99, rehearing denied 358 U. S. 901, 79 S. Ct. 221, 3 L. Ed. 2d 150, sets forth the law applicable to this case when at page 128 the court states:

"Proof that one had exclusive control and dominion over property on or in which contraband narcotics were found, is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof . . ."

"Where one has exclusive possession of the home or apartment in which narcotics are found, it may be inferred, even in the absence of other incriminating evidence that such person knew of the presence of the narcotics and had control of them." (Emphasis added.)

A further statement is found in *Rodella v. United States* (9th Cir. 1960), 286 F. 2d 306, 312, cert. denied 365 U. S. 889, 81 S. Ct. 1042, 6 L. Ed. 2d 199.

"There is no question in our mind but that a person should be held to be in possession of an object if that object, even though not in his manual or personal physical possession, is, for example, in his home, behind locked doors, and within a safe

> therein, to which home and safe the person has access and makes no explanation as to how or why he has such control . . ."

These holdings and the case of *Eason v. United States* (9th Cir. 1960), 281 F. 2d 818, where the Court of Appeals sustained a conviction in a fact situation closely similar to the one at hand, indicate that exclusive possession of the premises is determinative.

A consideration of the cases relied upon by the appellants reveals a lack of exclusive possession. In the *Evans* case, *supra,* the record indicated that the appellant was arrested at the home of a lady friend. A search incident to the arrest revealed a quantity of marihuana under the carpet of the top step of the stairs inside the dwelling. Further, the evidence indicated that the woman paid the rent and was the main customer for the gas and electric service; the appellant visited the residence infrequently; the appellant maintained no clothing there and had only been at the residence five minutes at the time of his arrest which led to the search. Based upon this, the Court reversed.

The next case relied upon is *People v. Antista,* 129 Cal. App. 2d 47, 276 P. 2d 177. In that case the California state court said at page 51:

> "Exclusive control and dominion over a car found to contain a narcotic is, of course, a potent circumstance in the question of possession of its contents."

But the appellate court went on to state that the appellant's friends had ready access to his home as he left the key under the door mat; a convicted narcotics user had been residing at the house for ten days pre-

ceeding the search in question and the narcotics had been secreted in a part of the house not frequented by the appellant. The Court held that the requisite possession had not been proven.

In *Arellanes v. United States* (9th Cir. 1962), 302 F. 2d 603, cert. denied 371 U. S. 930, 83 S. Ct. 294, 9 L. Ed. 2d 238, the Court of Appeals for the Ninth Circuit reversed the conviction of the appellant. The Court in finding that there was not an exclusive possession said at page 606:

> ". . . Proof of exclusive control or dominion over property on which contraband narcotics are found is a strong circumstance tending to prove knowledge of the presence of such narcotics and control thereof . . . On the other hand, mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession. Applying these criteria to the instant case, we find that Mrs. Arellanes connection with the drugs is not shown to go beyond the enumerated insufficiencies."

The case at hand stands in contrast to those cited by the appellants. With respect to the exclusive occupation of the premises, there is the uncontradicted testimony of Rodriguez that he lived at 910 Boyle Street with his wife, appellant Delgado, and their two children. [R. T. 112.] There was no testimony that Manuel Martinez had a ready access to the apartment; as a matter of fact, Officer Velasquez stated that at no time was he told Manuel Martinez frequented the apartment

during his noon hour or that Manuel Martinez kept a portion of his wardrobe in a closet within the apartment and had resided with the Rodriguezes prior to his marriage. [R. T. 145, 146.]

Viewed in the light most favorable to the appellee, the circumstances indicative of appellants' involvement are that there was an apparently innocuous social call by Manuel Martinez and his wife on the evening of February 6, 1963. There was absolutely no indication that Manuel Martinez was conscious of the surveillance being conducted by the officers which might have occasioned him seeking to conceal the narcotics discovered on the premises. At the time of the arrest, there were four adults and a year-old infant in the house; it is unlikely that Manuel Martinez would choose this time to conceal narcotics in two different rooms. Further, it is most unusual for a party to conceal narcotics in an unsuspecting relative's house; and if one is going to do such a thing, it is certainly not likely that he would choose the laundry hamper in the child's room and the night stand in the parents' room for his hiding place. Additionally, the evidence upon which the convictions were based, consisted of the testimony of Officer Velasquez that he discovered $650 in purses in the master bedroom. When he questioned the appellant Delgado relative to the cash, she stated that she had saved this money from her unemployment and her husband's odd jobs. Considering the circumstances of the case it was within the jury's prerogative to determine that these moneys were the result of narcotic sales. Also, the marihuana convictions rested upon the discovery of seven marihuana cigarettes and a quantity of loose marihuana wrapped in a newspaper, all of

which were contained in the night table at the foot of appellants' bed. The location and state of the marihuana circumstantially indicate that the occupants of the room were making their own cigarettes.

IV.
CONCLUSION.

On the facts in this record and the law applicable thereto, for the reasons stated herein, the judgment entered against appellants Gilbert Hernandez Rodriguez and Patrice Martinez Delgado are free from error and should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William D. Keller